

¹ Although it was noted at page 5 of the Regular Hearing transcript that American Manufacturers Mutual Insurance Company was also known as Broadspire Services, Inc., the latter appears to be a third-party administrator.

ISSUES

On July 9, 2004, claimant filed two Applications for Hearing with the Division of Workers Compensation. The first application alleged injuries to the “neck, back, shoulders, and both arms” from “repetitive use of back and shoulders and lifting” on May 3, 2000, and each and every day thereafter. That application was assigned Docket No. 1,017,841.

The second Application for Hearing alleged injuries to the “hand, bilateral carpal tunnel syndrome” from repetitive use on October 1, 2002, and each and every day thereafter. That application was assigned Docket No. 1,017,842.

In the May 9, 2007, Award, Judge Clark granted claimant disability benefits under K.S.A. 44-510e for an 11 percent whole person functional impairment for the period from October 1, 2002, until June 17, 2005, when he was laid off. The Judge adopted the 11 percent whole person functional impairment rating provided by Dr. Philip R. Mills, whom the Judge selected to perform an independent medical evaluation. Consequently, the Judge determined claimant sustained a 10 percent impairment to his right upper extremity (six percent to the whole person) related to carpal tunnel syndrome and a five percent whole person impairment related to his neck. But for the period following claimant’s termination, the Judge awarded claimant a 64 percent work disability (a permanent partial general disability greater than the functional impairment rating).

The Award bears both docket numbers. On page 3 of the Award, the Judge found claimant was injured working for respondent on March 3, 2000, and each and every working day through October 1, 2002. On page 5 of the Award, the Judge referred to claimant’s date of injury as October 1, 2002.

Respondent contends Judge Clark erred. Respondent argues Docket No. 1,017,841 was not properly before the Judge and, therefore, the Judge erred by addressing the injuries in that claim. Accordingly, respondent argues claimant’s injuries in Docket No. 1,017,842 are limited to his upper extremities and, therefore, the Judge erred by awarding claimant permanent disability benefits under K.S.A. 44-510e rather than under the schedules of K.S.A. 44-510d. In short, respondent requests the Board to set aside the award for the neck injury that was claimed in Docket No. 1,017,841 and, instead, award claimant disability benefits in Docket No. 1,017,842 for scheduled injuries to the upper extremities. In that vein, respondent contends claimant does not have any functional impairment to his left upper extremity but he has a 5 to 10 percent impairment to his right upper extremity.

In the alternative, in the event the Board should determine Docket No. 1,017,841 was properly before the Judge, respondent argues:

[C]laimant has failed to carry his burden in proving restrictions and task loss associated with the neck injury. Absent restrictions and task loss specifically

associated with the alleged neck injury, pursuant to Casco, the claimant's recovery is restricted to the extent of two scheduled injuries.²

Claimant also contends Judge Clark erred. Claimant argues he has an 83.33 percent permanent disability, which is based upon a 100 percent wage loss and the 66.67 percent task loss percentage provided by his medical expert, Dr. Pedro A. Murati. Regarding the question of whether Docket No. 1,017,841 was before the Judge for decision, claimant's attorney contends both cases were addressed at the prehearing settlement conference and he thought the claims had been combined for purposes of regular hearing and disposition.

The only issues before the Board on this appeal are:

1. Was Docket No. 1,017,841 before the Judge for decision?
2. What is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant, on the same date, filed two Applications for Hearing with the Division of Workers Compensation. As indicated above, the application that alleged injuries to his neck, back, shoulders, and both arms was assigned Docket No. 1,017,841. The application that alleged injuries to his hand and bilateral carpal tunnel syndrome was assigned Docket No. 1,017,842. Attorney Frederick L. Haag first appeared for respondent and the Insurance Company of the State of Pennsylvania in the first docket number. Attorney Kirby A. Vernon initially appeared for respondent and American in the latter docket number.

As required by statute, the parties attended a prehearing settlement conference. The amended notice of the conference included both claims. Nonetheless, when claimant sent respondent notice of the January 8, 2007, regular hearing, claimant only listed Docket No. 1,017,842.

Both claimant and respondent appeared at the regular hearing. Respondent appeared through Mr. Vernon and claimant appeared in person along with Mr. Stalcup. At the regular hearing, the Judge announced the hearing was being conducted in Docket No. 1,017,842. Nonetheless, when addressing the parties' stipulations, the parties discussed two accident dates – May 3, 2000, and October 1, 2002. But when discussing the accident dates, claimant's attorney briefly touched upon Docket No. 1,017,841.

² Respondent's Brief at 2 (filed June 13, 2007).

The Court: Does respondent admit claimant met with personal injury by accident on those dates?

Mr. Vernon: The first accident date was when?

The Court: 5-3 of 2000.

Mr. Vernon: And the second accident was October 1.

Mr. Stalcup: 2002.

Mr. Vernon: October of '02, we will -- the reason why I hesitate, Your Honor, I think it is a repetitive trauma case. I want to make sure.

Mr. Stalcup: And it is. And this is one where, if I may, we had an 841 docket number as well. Fred Haag was on that. And you and he apparently had an agreement as to the two cases. But I don't want to speak out of turn.

Mr. Vernon: I'll deny, Your Honor, due to the fact that it appears that this is a repetitive trauma and, therefore, there's a question with regard to the actual date of accident.

The Court: Does respondent admit claimant's alleged accidental injuries arose out of and in the course of employment?

Mr. Vernon: With regards to bilateral upper extremities and allegations for shoulders and neck, we will acknowledge that is what is contended, Your Honor.³

At oral argument before the Board, Mr. Vernon stated he was now respondent's counsel in both docketed claims. Mr. Vernon also stated he was aware at the regular hearing that claimant was proceeding on the basis that both claims and docket numbers were being litigated together. Finally, Mr. Vernon acknowledged the parties have presented their evidence for both claims and, therefore, the claims need not be remanded for taking additional evidence.

It is troubling Mr. Vernon knew claimant was litigating the alleged accidents from both docket numbers at the January 2007 regular hearing and at later depositions but he did not reveal his objections until such time as he filed his submission letter and the record was closed. Had Mr. Vernon properly stated his objections at the regular hearing, those matters could have been addressed and easily resolved before the parties proceeded to present their evidence.

³ R.H. Trans. at 3, 4.

In short, the record fails to show that Docket No. 1,017,841 was properly before the Judge and respondent's objection, albeit a technical one, is valid. Accordingly, the May 9, 2007, Award is set aside and these claims should be remanded to the Judge for resolution.

There is nothing in the administrative file nor any announcement on the record about Mr. Vernon's entry of appearance in Docket No. 1,017,841. Therefore, Mr. Haag will receive a copy of the Board's Order as he remains the attorney of record in that docket number.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁴ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

WHEREFORE, the Board sets aside the May 9, 2007, Award and remands these claims for resolution.

IT IS SO ORDERED.

Dated this ____ day of September, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Frederick L. Haag, Attorney for Respondent & Ins. Co. of the State of Pennsylvania
Kirby A. Vernon, Attorney for Respondent & American
John D. Clark, Administrative Law Judge

⁴ K.S.A. 2006 Supp. 44-555c(k).